



State and Tribal Historic Preservation Officers

BACKGROUND

The National Historic Preservation Act (NHPA) was enacted in 1966 to protect the Nation's historical resources from mounting development and expansion pressures by establishing a comprehensive national historic preservation policy. The U.S. Department of Energy (DOE), as a federal property holder and manager, is required to comply with this act, particularly sections 106 and 110 that contain specific requirements for federal agencies. Section 106 defines the process for identifying historic properties and determining impact, and section 110 ensures that historic preservation is fully integrated into the ongoing programs and missions of all federal agencies.

State and Tribal Historic Preservation Officers (SHPOs and THPOs) have been given major responsibilities under this law. Consequently, it is important that DOE facility managers and cultural resource personnel have a clear understanding of the role and authority of the SHPO and THPO under NHPA.

Section 106 of the NHPA in conjunction with its implementing regulations (36 Code of Federal Regulations [CFR] part 800) defines what is known as the section 106 process. This section is administered at the state level by the SHPO in association with the national Advisory Council on Historic Preservation (Advisory Council). Amendments to the NHPA in 1992 allow the designation of THPOs and provide a mechanism for them to assume the functions and responsibilities of SHPOs on tribal lands.

The section 106 process requires federal agencies to locate and identify historic properties within the area potentially impacted by their undertakings¹, determine if any of these properties are eligible for inclusion on the National Register of Historic Places (National Register), assess whether there would be adverse impacts to eligible properties, and attempt to resolve any adverse impacts. Throughout this process, DOE is required to seek, discuss, and consider the views of other participants, including the SHPO and/or THPO, and, where feasible, to strive for a solution agreeable to all concerned parties.

Section 110 requires federal agencies to provide leadership in preserving, restoring, and maintaining the historic and cultural environment of the Nation. It also requires them to establish preservation programs commensurate with their missions and the effects of their authorized programs on historic properties. Standards and guidelines issued by the Secretary of the Interior to implement section 110 direct federal agencies, such as DOE, to consult with knowledgeable and concerned parties outside the agency (e.g., SHPOs, THPOs) about their historic preservation-related activities. Thus, section 110 prescribes general and specific responsibilities of federal agencies in the protection of historically significant properties.

STATUTES

National Historic Preservation Act of 1966, as amended.

EXECUTIVE ORDERS

Executive Memorandum. 2004. Government-to-Government Relationship with Tribal Governments. September 23.

Executive Order (E.O.) 13175. 2000. *Consultation and Coordination with Indian Tribal Governments*. November 6 (supercedes E.O. 13084 of the same title).

E.O. 13007. 1996. *Indian Sacred Sites*. May 24.

Executive Memorandum. 1994. Government-to-Government Relations with Native American Tribal Governments. April 29.

¹The term "undertaking" is defined in Section 301(7) of NHPA as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including—

- (A) those carried out by or on behalf of the agency;
- (B) those carried out with federal financial assistance;
- (C) those requiring a federal permit, license, or approval; and
- (D) those subject to state or local regulations administered pursuant to a delegation or approval by a federal agency."

REGULATIONS:

36 CFR part 60: *National Register of Historic Places.*

36 CFR part 61: *Procedures for State, Tribal, and Local Government Historic Preservation Programs.*

36 CFR part 63: *Determinations of Eligibility for Inclusion on the National Register of Historic Places.*

36 CFR part 800: *Protection of Historic Properties.*

43 CFR part 7: *Protection of Archaeological Resources.*

43 CFR part 10: *Native American Graves Protection and Repatriation Regulations.*

REFERENCES:

U.S. Department of Energy

- Office of Air, Water and Radiation Protection Policy and Guidance (EH-41) Information Brief. *Management of Cultural Resources at Department of Energy Facilities.* DOE/EH-412/0005r. Revised February 2006.
- Office of Air, Water and Radiation Protection Policy and Guidance (EH-41) Information Brief. *Archaeological Resources Protection Act.* EH-232-0004/0193r. January 1993, revised February 2006.
- Office of Air, Water and Radiation Protection Policy and Guidance (EH-41) Information Brief. *Native American Graves Protection and Repatriation Act.* EH-232-0003/1092r. October 1992, revised February 2006.
- Office of Air, Water and Radiation Protection Policy and Guidance (EH-41) Information Brief. *National Historic Preservation Act.* DOE/EH-412/0002r. Revised February 2006.
- Office of Congressional and Intergovernmental Affairs (CI). *American Indian and Alaska Native Tribal Government Policy*². January 2006.
- Office of Air, Water and Radiation Protection Policy and Guidance (EH-41) Information Brief. *Consultation with Native Americans.* DOE/EH-41-0019/1204. December 2004.
- Office of Environment, Safety and Health (EH). *Environmental Guidelines for Development of Cultural Resource Management Plans—Update.* DOE G 450.1-3. September 22, 2004.
- Office of Environment, Safety and Health (EH). *Department of Energy Management of Cultural Resources.* DOE P 141.1. May 2, 2001.
- Office of Intergovernmental and Public Accountability (EM-11). *A Guide for DOE Employees. Working with Indian Tribal Nations*³. December 2000.
- Office of Environmental Guidance (EH-232)⁴ Memorandum. *National Historic Preservation Act Amendments of 1992.* August 26, 1993.
- Office of Environmental Guidance (EH-232)⁴ Memorandum. *The Native American Graves Protection and Repatriation Act.* July 30, 1992.
- Office of Congressional and Intergovernmental Affairs (CI). *American Indian Tribal Government Policy*⁵. DOE Order 1230.2. April 4, 1992.

² This policy is implemented by DOE Order 1230.2. It replaces the 1992 Policy that was Attachment 1 to that Order.

³ The DOE American Indian Policy included as Appendix 3 in this document is the 1992 Policy that has been replaced by the January 2006 Policy referenced above.

⁴ Currently known as the Office of Air, Water and Radiation Protection Policy and Guidance (EH-41).

⁵ The policy contained in Attachment 1 to this DOE Order was replaced by the *American Indian and Alaska Native Tribal Government Policy* of January 2006. The Order itself is still in effect and implements that policy.

REFERENCES (cont.):

U.S. Department of Energy (cont.)

- Office of Environmental Guidance (EH-231)⁴ Memorandum. *Management of Cultural Resources at Department of Energy Facilities*. February 23, 1990.

U.S. Department of the Interior, National Park Service, and Advisory Council on Historic Preservation

- *The Section 110 Guidelines; Annotated Guidelines for Federal Agency Responsibilities under Section 110 of the National Historic Preservation Act*. November 1989.

SHPOs and THPOs

Section 101(b)(1) of the NHPA establishes State Historic Preservation Programs. It also provides for state governors to designate and appoint a SHPO to administer the program at the state level.

Section 101(d) of the NHPA authorizes the creation of Tribal Historic Preservation Programs. Federally recognized Indian tribes⁶ can take on formal responsibility for the preservation of significant historic properties on tribal land and can assume any or all of the functions⁷ of a SHPO with respect to such land. The decision on whether to participate in the program rests with the tribe. Tribal historic preservation regulations can be substituted for the Advisory Council's regulations in 36 CFR part 800 to implement section 106 on tribal land. Thus, for tribes that have THPOs, DOE consults with them in lieu of the SHPO for undertakings occurring on, or affecting historic properties on, their tribal lands. When a tribe has not assumed the SHPO's section 106 responsibilities and a DOE undertaking would occur on or affect historic properties on tribal lands, DOE consults with both the SHPO and a representative designated by the Indian tribe or, if such a person has not been designated, the tribe's primary elected official.

SHPO/THPO Duties

SHPOs and THPOs are mandated by sections 106 and 110 of the NHPA to assist federal agencies, such

as DOE, in matters related to historic preservation. Section 101(b)(3) of NHPA charges SHPOs and THPOs to perform the following tasks:

- advise and assist federal, state, and tribal agencies and local governments in carrying out their historic preservation responsibilities;
- conduct comprehensive surveys of historic properties in a state or on tribal land and maintain inventories of such properties;
- identify and nominate eligible historic properties to the National Register;
- develop and implement state or tribal historic preservation plans;
- administer historic preservation funds;
- work with the Advisory Council, federal agencies, and others to ensure that historic properties are taken into account at all levels of project planning and development;
- provide information, training, and technical assistance in historic preservation;
- assist in the development of local historic preservation planning;
- consult with federal agencies on their undertakings that may affect historical properties and on the content and sufficiency of any plans developed

⁶ Section 301(4) of the NHPA defines "Indian tribe" or "tribe" as "...an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 1602 of title 43 [the Alaska Native Claims Settlement Act], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

⁷ These functions are aimed at the preservation of significant historic properties. They include identifying and maintaining inventories of culturally significant properties, nominating properties to national and tribal registers of historic places, conducting section 106 reviews of federal agency projects on tribal lands, and conducting educational programs on the importance of preserving historic properties.

to protect, manage, or reduce or mitigate harm to such properties; and

- advise and assist in the evaluation of proposals for rehabilitation projects that may qualify for federal assistance.

Resources and Information Available from the SHPO or THPO

As experts on their state's or tribe's cultural resources, SHPOs and THPOs can provide information, technical advice, and guidance to DOE facility managers and assist them in fulfilling their legal obligations under NHPA.

SHPOs and THPOs maintain lists of the National Register properties in their states or on their tribal lands. In addition, they have information about properties in the process of nomination and those determined to be eligible for listing in the National Register. They may also maintain archaeological site records, historic property survey forms, and maps or other locational information. Much of this information is now accessible on the internet.

In addition to the inventories kept by the SHPOs, some states maintain inventories that are controlled by the State Archaeologist. In order to protect archaeological sites listed in such inventories, the exact location of many of them may not be readily available to the general public. Most State Archaeologists are directly associated with the State Historic Preservation Offices, and they work closely with the SHPOs in the section 106 review process. All of the information controlled by SHPOs and State Archaeologists is available to DOE upon request.

Consultation with Indian tribes (including those in Alaska) must be done on a government-to-government basis. (See EH-41 Information Brief on *Consultation with Native Americans*.) Obtaining information about properties to which Indian tribes and Native Hawaiian organizations attach religious and cultural significance must be done in a manner that is sensitive to the governmental structures of the tribes and organizations. Tribes and Native Hawaiian organizations may be reluctant to share information about such properties. DOE must recognize this fact and be willing to identify historic properties without compromising concerns about confidentiality. DOE should also be sensitive to the internal workings of a tribe or Native Hawaiian organization and allow the time necessary for their decision-making process to operate.

Documents Required by the SHPOs for Identifying Cultural Resources and Historic Properties

Cultural resources are defined as any prehistoric or historic district, site, building, structure, or object considered important to a culture, subculture, or community for scientific, traditional, religious, or any other reason. When these resources meet any one of the criteria listed in the NHPA regulations (36 CFR 60.4), they may be termed historic properties and, thereby, are potentially eligible for inclusion on the National Register.

To help DOE identify historic properties, most SHPOs require only the documents described in 30 CFR part 800, including the National Register-recording forms and accompanying support material such as maps and photographs. Some states provide comprehensive checklists to assist in data compilation, and some have their own recording forms that agencies are required to complete.

SHPOs/THPOs and DOE Compliance with Section 110

Section 110 requires DOE facility managers to preserve, restore, and maintain the historic and cultural environment of the Nation by implementing and managing ongoing historic preservation activities on agency property. DOE facility managers must coordinate with the SHPOs and THPOs as they comply with the section 110 provisions [NHPA section 110(a)(2)]. The DOE cultural resources management (CRM) program implements the requirements of section 110, and each DOE facility should develop a site- or program-specific CRM plan (CRMP). (See DOE G 450.1-3, *Environmental Guidelines for Development of Cultural Resource Management Plans—Update*.)

Some SHPOs view their role in the section 110 process as identical to their role in the section 106 process. However, most believe that by the very nature of the section 110 provisions, they must assume a more proactive role to implement it. SHPOs and THPOs are charged to assist DOE facility managers in developing and implementing cultural resources surveys and in developing CRMPs. Thus, the SHPO or THPO can play a vital role in the development of CRMPs.

Although, by definition, section 110 implementation should precede section 106 compliance, it often follows as a result of section 106 activities. If section 110 compliance preceded section 106, then whenever DOE initiated new projects on its property, much of the work needed for section 106

compliance would be completed. This reinforces the need for DOE sites and programs to develop and implement CRMPs.

Initiating the Section 106 Review Process

The procedures used by DOE and most other federal agencies to comply with section 106 of the NHPA are detailed in 36 CFR part 800. This regulation establishes ways for identifying and evaluating historic properties, assessing the possible effects of DOE's proposed action on historic properties, and developing a plan to avoid or mitigate any harmful or adverse effects on such properties.

A primary component of the section 106 process involves consulting with the SHPO or THPO early in the planning stages of any undertaking that may potentially affect historic properties. The early involvement of the SHPOs or THPOs establishes a working relationship with them and enables them to identify "red flags" that may indicate potential problems or difficulties in executing a DOE-sponsored project.

SHPOs and THPOs may suggest ways to make compliance with section 106 more efficient and cost effective by:

- limiting test surveys,
- providing lists of professional archaeologists qualified to conduct surveys,
- providing details on known cultural resources, and
- assisting in the development of long-range CRMPs.

Although most SHPOs and THPOs prefer to be contacted by DOE early in the planning stages of an undertaking (as stipulated in section 106), some favor interaction later in the process when all of the information necessary to comment on the project is available. If they are contacted too late, however, there is little or no chance of modifying DOE's plans to reflect and include cultural resources. Regardless of when individual SHPOs or THPOs prefer to be brought into the process, it is essential that DOE facility managers and cultural resource personnel provide them with complete information on the project in a timely manner.

Consultation with SHPO/THPO under Section 106

DOE must consult with the SHPO or THPO at various stages of the section 106 process. (Details of the section 106 consultation process can be found in

EH-41's Information Brief, *National Historic Preservation Act*. See also the EH-41 Information Brief, *Consultation with Native Americans*.) Stages at which DOE must consult with the SHPO or THPO include identifying historic properties, assessing adverse effects, and resolving adverse effects.

When it is determined that historic properties might be adversely affected by a proposed DOE undertaking, DOE consults with the SHPO or THPO and other parties to develop a Memorandum of Agreement (MOA) or Programmatic Agreement (PA) identifying specific mitigation measures for cultural resources. A MOA is normally used when DOE proposes only one project on one property; PAs provide for DOE section 106 compliance for an entire program or for multiple properties. By signing these documents, DOE agrees to adhere to the processes, methods, and procedures in them while implementing the proposed actions. Similarly, the SHPO/THPO, DOE, and the Advisory Council, if a signatory, agree that the standards and requirements of the documents will fulfill DOE's responsibilities concerning cultural resources. If the terms of the PA or MOA cannot be followed, DOE must reopen the section 106 process and bring it to a suitable close as prescribed in the regulations.

SHPO/THPO Participation in Discovery Situations

If after completing section 106 compliance, DOE discovers a historic property while implementing an undertaking, the NHPA regulations provide for special review by the SHPO/THPO and the Advisory Council. The SHPO or THPO will review an inadvertent discovery on an expedited basis when so requested by DOE. If the newly-discovered property is of archaeological value and subject to the requirements of the Archaeological Resources Protection Act of 1979 (see the EH-41 Information Brief, *Archaeological Resources Protection Act*), DOE can elect to comply with the regulations implementing that act (43 CFR part 7) rather than the Advisory Council's regulations implementing NHPA section 106 (36 CFR part 800). DOE, however, must still give the SHPO or THPO an opportunity to comment on the project.

SHPO/THPO Participation in Emergency Situations

In the event of an emergency action (such as that taken in response to a major natural disaster or terrorist incident), DOE is required, if circumstances permit, to allow the SHPO or THPO and the Advisory Council seven days to comment on DOE's

undertaking. Immediate rescue and salvage operations conducted to preserve life or property are, however, exempt from the provisions of section 106. When an emergency is declared by a local government that is responsible for section 106 compliance, the SHPO, THPO, or Advisory Council may object to following the expedited approach and require that the standard procedures set forth in the regulations be followed.

Consultation with Native American Tribes and Native Hawaiian Organizations

DOE's *American Indian and Alaska Native Tribal Government Policy*, implemented by DOE Order 1230.2, sets forth the principles to be followed by DOE to ensure effective implementation of a government-to-government relationship with tribal governments. The Policy provides direction to all Departmental officials, staff, and contractors on how to fulfill DOE's trust obligations and other responsibilities when DOE actions may impact traditional cultural and religious values and practices, natural resources, or treaty and other federally recognized and reserved rights. One principle of the Policy is that DOE will ensure department-wide compliance with applicable federal cultural resource protection laws and E.O.s in order to assist in preserving and protecting traditional tribal religious practices and also historic and cultural sites to which tribes attach religious or cultural importance. Thus, this department-wide Policy commits DOE to consult tribes during implementation of the NHPA. (See EH-41 Information Brief, *Consultation with Native Americans*.)

If a DOE undertaking may have an adverse effect on traditional Native American resources, DOE must consult with the concerned federally recognized tribe. When a DOE undertaking is on land owned by a tribe, Indian tribes participate in section 106 consultation in lieu of the SHPO if they have a designated THPO; if they do not have a designated THPO, they participate in section 106 consultation in addition to the SHPO. Also, DOE must consult with any American Indian or Alaska native tribe or Native Hawaiian organization that attaches religious and cultural significance to properties determined to be eligible for inclusion on the National Register, regardless of the location of such properties (i.e., even if the properties are not on land of the tribe or Native Hawaiian organization). Thus, it may be necessary to look beyond reservations and tribal lands in the

project's general vicinity to seek information on tribes that had historically been located in an area but are no longer there.

The Bureau of Indian Affairs and the National Park Service can provide initial contact information for tribes that do not have a THPO. (To identify consultation contacts for each federally recognized Indian tribe [including Alaska Native villages], Alaska Native corporation, and Native Hawaiian organization, see <http://www.cr.nps.gov/nagpra/nacd/>.) Also, the SHPO can generally provide DOE with the names of tribes that are associated with the area of potential impact as well as contact information for the tribally designated representative who will speak for the tribe's interests in the consultation process.

Native American burials are protected under the Native American Graves Protection and Repatriation Act of 1990. (See the EH-41 Information Brief, *Native American Graves Protection Repatriation Act*.) In addition to this national legislation most states have burial laws that protect graves on all property, federal or non-federal. The SHPOs may be able to provide information and guidance to DOE on these laws and how they should be considered during project planning and implementation.

Questions of policy or questions requiring policy decisions will not be addressed in EH-41 Information Briefs unless that policy has already been established through appropriate documentation. Please refer any questions concerning the subject material covered in this Information Brief to Lois Thompson, Office of Air, Water and Radiation Protection Policy and Guidance, EH-41, (202) 586-9581; fax: (202) 586-3915; e-mail: Lois.Thompson@eh.doe.gov.